SBSK PLANTATIONS SDN BHD

v.

DYNASTY RANGERS (M) SDN BHD

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[ORIGINATING SUMMONS NO: 24-901-2001]
19 NOVEMBER 2001

COMPANY LAW: *Winding-up - Injunction to restrain petition - Petition based on judgment debt - Pending appeal against judgment debt - Whether judgment debt rendered a disputed debt - Whether injunction should be granted pending outcome of appeal - Whether judgment debt a valid and enforceable judgment unless stayed or set aside - Companies Act 1965, s. 218*

CIVIL PROCEDURE: *Judgment - Judgment debt - Enforcement of judgment debt - Pending appeal against judgment debt - Whether judgment debt could be enforced in view thereof - Whether pending appeal rendered judgment debt a disputed debt - Whether judgment debt a valid and enforceable judgment unless stayed or set aside*

On 3 September 2001, the deputy registrar ('DR') gave summary judgment against the plaintiff for a sum of RM12,099,825.17 and also a sum of S$166,439.89 being the costs of arbitration proceedings that had given rise to the said judgment sum. Dissatisfied with the order of the DR, the plaintiff filed a notice of appeal to the judge in chambers on a certificate of urgency and the appeal was fixed for hearing on 23 October 2001. On the same date that the summary judgment was granted, the defendant issued a statutory notice based on the judgment debt pursuant to s. 218(2)(a) of the Companies Act 1965 ('CA'). On 24 September 2001, the plaintiff obtained an *ex parte* injunction pursuant to its application in encl. 3 to restrain the defendant from presenting a winding-up petition upon the expiration of the 21-day period as set out in the statutory notice. The application before the court now was the plaintiff's application in encl. 7 for an *inter partes* interlocutory injunction to restrain the defendant from presenting the winding-up petition.

The main issue was whether the pending appeal filed against the judgment debt rendered the judgment debt a disputed debt, and whether in view thereof encl. 7 should be granted pending the outcome of appeal. Also, whether the *ex parte* injunction should be set aside on the grounds that the plaintiff breached O. 29 r. 1(2A)(c) of the Rules of the High Court 1980 ('RHC') as no notice of encl. 3 was given to the defendant and as there was non-disclosure of material facts by the plaintiff.

Held:

[1] The statutory notice was served on the plaintiff on 3 September 2001, yet the plaintiff only applied on 17 September 2001, which was a good 14 days later for the *ex parte* injunction. Further, encl. 3 was fixed for hearing another 7 days later, *ie*, on 24 September 2001 which was also the last day of the statutory notice. The plaintiff could have easily served an unsealed copy of encl. 3 on the defendant's solicitors anytime after 17 September 2001 and before 24 September 2001. However, that was not done. On that ground alone, the *ex parte* injunction ought to be set aside. Further, the court was satisfied that there was no non-disclosure of material facts. (p 335 g-i)

[2] The summary judgment granted by the DR was a valid and enforceable judgment unless set aside or stayed pending appeal. The DR had considered the affidavit evidence of both parties before deciding that the defendant had established a *prima facie* claim against the plaintiff. Upon the defendant obtaining the summary judgment, the debt ceased to be a disputed debt. Thereafter the question whether the debt was a *bona fide* disputed debt became a non-issue. That was so even though the plaintiff filed an appeal against the judgment. The filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained. (p 343 c-d)

[3] The plaintiff had rightly proceeded to issue a statutory notice against the defendant pursuant to s. 218(2)(a) CA. Upon the expiration of the 21-day period as set out in the statutory notice and the judgment debt remaining unpaid, the debt became "due and payable" and the plaintiff was deemed to be unable to pay its debts. Consequently, the defendant succeeded in acquiring the status of "creditor" for the purposes of winding-up proceedings pursuant to s. 217 (1)(b) and s. 218(1)(e) CA. (343 e-f)

[4] The defendant was entitled as of right to present a winding-up petition against the plaintiff. That right was a substantive right conferred upon the plaintiff by s. 217(1)(b) CA, a substantive law, and neither O. 92 r. 4(2) RHC, a procedural law, nor the inherent jurisdiction of the court

can deprive the defendant of that right or reduce the extent of that right as the question of abuse of the process of the court ought not to arise at all in such a context. (p 343 g)

[5] The five grounds advanced by the plaintiff touching on the merits of the appeal would not be considered since there was already a regular and enforceable judgment. (p 344 c)

[6] There was no *bona fide* issue to be tried. The exercise by a would-be petitioner of his legal right to present a winding-up petition against a company for non-compliance of a s. 218(2)(a) CA statutory notice anchored on a judgment debt, *albeit* pending appeal, could not be regarded as an abuse of the process of the court. (p 344 d-e)

[Ex parte injunction set aside and encl. 7 dismissed with costs.]

Case(s) referred to:

Bank Utama (Malaysia) Bhd v. GKM Amal Bhd [2000] 2 CLJ 525 ***(refd)***

Bina Satu Sdn Bhd v. Tan Construction [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 ***(refd)***

Bruns & Ors v. Colocotronis (The "Vasso") [1979] Vol 2 LLR 412 ***(refd)***

Cadiz Waterworks Co v. Barnett LR 19 EQ 182 ***(refd)***

Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor and Another Appeal [1996] 1 CLJ 141 ***(refd)***

Dynasty Rangers (M) Sdn Bhd v. SBSK Plantations Sdn Bhd [2001] 7 CLJ 171 ***(refd)***

Ex parte Young, In re Kitchin [1881] Vol XVII Ch D 669 ***(refd)***

Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 ***(refd)***

In re Ban Hong Co Ltd [1959] 25 MLJ 100 ***(refd)***

Isyoda (M) Sdn Bhd v. Low Seong Tek [2000] 4 CLJ 621 ***(refd)***

Keet Gerald Francis John v. Mohd Noor Abdullah [1995] 1 CLJ 293 ***(refd)***

Patel Holdings Sdn Bhd v. Estet Pekebun Kecil Sdn Bhd & Anor [1990] 2 CLJ 280; [1990] 2 CLJ (Rep) 611 ***(refd)***

Public Bank Bhd v. Muhibbah Meridian Sdn Bhd [2001] 1 CLJ 1 ***(not foll)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***

Re Mechanised Construction Pte Ltd [1989] 3 MLJ 9 ***(refd)***

Re Nima Travel Sdn Bhd & Sun Soon Heng Coach Works Sdn Bhd v. Nima Travel Sdn Bhd [1986] 2 MLJ 374 ***(refd)***

Royal Brunei Airlines Sdn Bhd v. Philip Tan Kok Ming [1993] 3 CLJ 83 ***(refd)***

Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram [1998] 1 CLJ 1035 ***(refd)***

Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd [1998] 3 CLJ Supp 409 ***(not foll)***

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 218(1)(e), (2)(a), 222
Rules of the High Court 1980, O. 7 r. 3(1), O. 14, O. 29 r. 1(2A)(c), O. 92 r. 4(2)

For the plaintiff - G Rajasingam (SS Soo & Mohd Izral Khairy); M/s Shearn Delamore & Co
For the defendant - KL Wong; M/s Nik Hussain & Partners

Reported by Usha Thiagarajah

JUDGMENT

Su Geok Yiam JC:
This is an application by the plaintiff *vide* a summons in chambers (encl. 7) filed on 4 October 2001 for an *inter partes* interlocutory injunction to restrain the defendant until the disposal of the plaintiff's appeal to the judge in chambers in Ipoh High Court Civil Suit GS. No. 22-97-2000, from presenting a winding-up petition against the plaintiff in connection with the defendant's statutory notice dated 3 September 2001 which was served on the plaintiff pursuant to s. 218(2)(a) of the Companies Act 1965 requiring the plaintiff to make payment within 21 days from the date of receipt of the notice of the sum of RM12,099,825.17 together with interest thereon and a further sum of S$166,439.89 on the ground of abuse of the process of the court as the plaintiff's appeal to the judge in chambers has not been disposed of yet.

Facts And Background
The facts and background have already been set out in detail in my earlier grounds of judgment in respect of an application by the defendant for a Mareva injunction in respect of Ipoh High Court Civil Suit GS. No. 22-97-2000 (hereinafter referred to as "the said suit"). (See *Dynasty Rangers (M) Sdn Bhd v. S.B.S.K. Plantations Sdn Bhd* [2001] 7 CLJ 171).

Briefly, the plaintiff is the parent company of two subsidiary companies, namely, Perak Meat Industries Sdn Bhd (PMI) and Export-Link Pte Ltd (EPL). The plaintiff holds 64% of the issued and paid up share capital of PMI and approximately 52% of the issued and paid up capital of EPL. On 14 February 1997, Perak Freight Services Sdn Bhd (PFS) entered into a Time Charter with PMI and EPL for a period of five years. Subsequently, PFS assigned the rights under the Time Charter to the defendant. The plaintiff had given to the defendant, a corporate guarantee guaranteeing the "fulfillment of all responsibilities and obligations of PMI and EPL" under the Time Charter of a Vessel belonging to the defendant. Upon the default by PMI and EPL on the hire payments, the defendant terminated the Time Charter and withdrew the Vessel. The disputes between PMI and EPL and

the defendant were referred to arbitration. The defendant instituted the said suit to recover from the plaintiff, as guarantor, arrears of hire payable, interest and damages for breach of contract by PMI and EPL. The defendant also filed an application *vide* a summons in chambers dated 29 August 2000 under O. 14 of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") for summary judgment for a sum of RM12,099,825.17 which was the amount handed down by the arbitrators in their award in favour of the defendant against PMI and EPL comprising arrears of hire, damages for breach of contract and interest and also a sum of S$166,439.89 being the costs of the arbitration proceedings. The plaintiff was not a party to the arbitration proceedings.

In the interim, the defendant applied, unsuccessfully, for a Mareva injunction to freeze the plaintiff's assets up to a value of RM12.1 million. This court decided that although the defendant was able to show a good arguable case it had failed to satisfy the court that there was a real risk that the plaintiff would dissipate its assets.

Subsequent to that decision, the learned deputy registrar has, on 3 September 2001, given summary judgment to the defendant in the sum of RM12,099,825.17 and the sum of S$166,439.89 as prayed for.

The plaintiff, being dissatisfied with the order of the learned deputy registrar, filed a notice of appeal to the judge in chambers on a certificate of urgency. The appeal was fixed for hearing on 23 October 2001. The plaintiff did not apply immediately for a stay of execution of the summary judgment pending the appeal.

On the same date that the summary judgment was granted by the learned deputy registrar, the defendant issued against the plaintiff a statutory notice premised on the summary judgment debt pursuant to s. 218(2)(a) of the Companies Act 1965.

Plaintiff's Application For An *Ex parte* Injunction

Fearful that the defendant would present a winding up petition immediately upon the expiration of the 21 day period as set out in the statutory notice, thereby causing irreparable harm to its business and reputation, the plaintiff applied *vide* a summons in chambers (encl. 3) filed on 17 September 2001 for an *ex parte* injunction on a certificate of urgency (encl. 5) to restrain the defendant from so doing.

On 24 September 2001, after hearing submissions from Encik Mohd Izral, the learned counsel for the plaintiff, who was assisted by Miss S.S. Soo, I granted order-in-terms of encl. 3. I also ordered that the plaintiff's application for an *inter partes* injunction be fixed for hearing on 9 October 2001.

In his submissions, Encik Mohd Izral, the learned plaintiff counsel, had referred the court to the cases of *Keet Gerald Francis John v Mohd Noor bin Abdullah* [1995] 1 CLJ 293, *Royal Brunei Airlines Sdn Bhd v. Philip Tan Kok Ming* [1993] 3 CLJ 83, *Ex parte Young In re Kitchin* [1881] Vol. XVII Ch D 669, *Bruns and Others v. Colocotronis (The "Vasso")* [1979] Vol. 2 LLR 412, *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors.* [1987] 2 CLJ 227; [1987] CLJ (Rep) 656, *Public Bank Bhd v. Muhibbah Meridian Sdn Bhd* [2001] 1 CLJ 91 and *Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd* [1998] 3 CLJ Supp 409. Unfortunately, the cases of *Patel Holdings Sdn Bhd v. Estet Pekebun Kecil Sdn Bhd & Anor* [1990] 2 CLJ 280; [1990] 2 CLJ (Rep) 611 and *Bank Utama (Malaysia) Berhad v. GKM Amal Berhad* [2000] 2 CLJ 525 which did not favour the plaintiff were not cited to the court. I had granted the *ex parte* injunction on the following grounds: that it would be an abuse of the process of the court if the defendant is allowed to present a winding-up petition founded on the judgment debt which is a disputed debt in view of the pending appeal to the judge in chambers; there is, therefore, a *bona fide* serious question to be tried, namely, whether the decision of the learned deputy registrar granting summary judgment to the defendant is correct; the balance of convenience was in favour of the granting of the injunction as the plaintiff would suffer irreparable harm to its business and reputation; the plaintiff had given an undertaking in damages; and finally that notice of encl. 3 could not be given to the defendant because there was great urgency as the statutory notice would expire the next day. Encik Mohd Izral had submitted at length on the merits of the appeal in order to persuade the court that there was a disputed debt and a serious question to be tried.

Plaintiff's Application For An *Inter Partes* Injunction

On 9 October 2001, both parties appeared before the court for the hearing of encl. 7. The plaintiff/applicant was represented by Mr. G. Rajasingam who was assisted by Encik Mohd Izral and Miss S.S. Soo. Mr. K.L. Wong represented the defendant/respondent. Mr. G. Rajasingam informed the court that he had been served with an affidavit-in-reply by the defendant on Friday, 5 October 2001, and the plaintiff required time to reply. He also informed the court that although an unsealed copy of encl. 7 was served on the defendant on 4 October 2001 they had only extracted the sealed copy of encl. 7 that morning which was yet to be served on the plaintiff. He did not give any reason why the sealed copy of encl. 7 could not be extracted earlier and served on the defendant. He then sought a postponement of the hearing of encl. 7 to 15 October 2001 in order to reply to the defendant's affidavit-in-reply without explaining why the plaintiff could not have done so earlier. Upon strong objections from the defendant and mindful that the *ex parte* injunction would lapse on 15 October 2001,

the court refused the plaintiff's application for a postponement. The court heard submissions and the case was adjourned to 12 October 2001 for continued hearing.

On 12 October 2001, after hearing submissions from both sides I dismissed encl. 7 with costs in the cause and also set aside the *ex parte* injunction. I said I would give my reasons later. I now do so.

Setting Aside Of *Ex Parte* Injunction

Mr. K.L. Wong has submitted that the *ex parte* injunction should be set aside on the following grounds:

(1) no notice of encl. 3 was given to the defendant in breach of O. 29 r. 1(2A)(c) of the RHC despite prior notice having been given to the plaintiff's solicitors requiring service of a copy of the cause papers on them in the event the plaintiff applies to the court for appropriate relief; and

(2) there was non-disclosure of material facts by the plaintiff, in particular, the plaintiff did not inform the court that an application for stay of execution of the summary judgment had been filed on or about 17 September 2001 and the plaintiff failed to exhibit in encl. 3 all the cause papers filed in the said suit especially the defendant's second application for a Mareva injunction.

In response, Encik Mohd Izral explained that in view of the urgency of the matter a copy of encl. 3 could not be served on the defendant. He also submitted that there was no non-disclosure of material facts because he had informed the court orally that the plaintiff had applied for a stay of execution of the summary judgment pending appeal to the judge in chambers.

In respect of the defendant's first ground, the court did not find the plaintiff's explanation a satisfactory nor a reasonable one because the statutory notice was served on the plaintiff on 3 September 2001, yet the plaintiff only applied on 17 September 2001, which was a good 14 days later, for the *ex parte* injunction. Further, encl. 3 was fixed for hearing another seven days later, ie, on 24 September 2001, which was also the last day of the statutory notice. The plaintiff could have easily served an unsealed copy of encl. 3 on the defendant's solicitors anytime after 17 September 2001 and before 24 September 2001. However, this was not done. On this ground alone the *ex parte* injunction ought to be set aside.

In respect of the defendant's second ground, the court was satisfied that there was no non-disclosure of material facts.

Dismissal Of Application For *Inter Partes* Injunction

In respect of encl. 7, the plaintiff has contended as follows:

(1) the defendant cannot at this stage present a winding-up petition on the strength of the s. 218(2)(a) notice dated 3 September 2000 as it is anchored on a judgment debt which is a *bona fide* disputed debt being the subject of a further appeal to the learned judge in the said suit; and

(2) until such time as the judgment debt is final and conclusive, the debt remains *sub judice* and any presentation of a winding-up petition with a view to winding up the plaintiff is an abuse of the process of the court.

In support of his two contentions Mr. G. Rajasingam, the learned counsel for the plaintiff relied on four cases, namely, *Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd* [1998] 3 CLJ Supp 409, *Public Bank Bhd v. Muhibbah Meridian Sdn Bhd* [2001] 1 CLJ 91, *Bina Satu Sdn Bhd v. Tan Construction (sued as a firm)* [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384, *Isyoda (M) Sdn Bhd v. Low Seong Tek (t/a Seong Trading Co)* [2000] 4 CLJ 621 and *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 CLJ 227; [1987] CLJ (Rep) 656.

Mr. K.L. Wong, the learned counsel for the defendant, has vigorously opposed the plaintiff's application. He submits that the two contentions raised by the respondent's learned counsel should be rejected and encl. 7 be dismissed with costs on the following grounds. First, the judgment debt cannot be said to be a disputed debt despite a pending appeal. Secondly, the court cannot go into the merits of the appeal at this stage. Thirdly, the plaintiff should apply to the learned deputy registrar to stay the summary judgment. Fourthly, in respect of this application the court should only consider the principles applicable to the granting of interlocutory injunctions, in particular, whether there is a serious question to be tried and as there is already a summary judgment, there is no serious question to be tried.

In support of his submissions he has relied on the cases of *Patel Holdings Sdn Bhd v. Estet Pekebun Kecil Sdn Bhd & Anor* [1990] 2 CLJ 280; [1990] 2 CLJ (Rep) 611, *Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor and Another Appeal* [1996] 1 CLJ 141 and *Bank Utama (Malaysia) Berhad v. GKM Amal Berhad* [2000] 2 CLJ 525.

Cases Cited By The Plaintiff

I shall now consider the authorities relied on by the plaintiff. These authorities hold the view that as long as there is an appeal pending the judgment debt is a disputed debt and is not final and conclusive until the final outcome of the appeal culminates in the petitioner's favour.

In the first case, namely, the *Solid Kitchen* case *(supra)* the petitioner had obtained a summary judgment in the Sessions Court. The respondent appealed to the High Court against the judgment. The respondent also filed an application in the Sessions Court to stay execution of the judgment. In the interim, the petitioner, relying on the summary judgment, proceeded to issue a statutory notice pursuant to s. 218 of the Companies Act 1965. Upon the failure of the respondent to pay the judgment sum within the 21 day period as set out in the notice, the petitioner immediately presented a petition to wind-up the respondent on the ground that the debt had become due and payable. The respondent applied for all further proceedings in the petition to be stayed pending the hearing and decision of the respondent's appeal pursuant to O. 92 r. 4 of the RHC and/or under the inherent jurisdiction of the court and/or alternatively under s. 222 of the Companies Act 1965.

In granting a stay of the proceedings, Rekhraj J held that the debt was a disputed debt because of the pending appeal to the High Court. It was not a "debt due and payable" and the petitioner was not a "creditor" of the respondent until the disposal of the appeal in the petitioner's favour whereupon the judgment would become final and conclusive. He said as follows on p. 411:

> Presentation of winding-up petitions are not a means of execution proceedings envisaged under O. 45 of the (RHC), but independent proceedings taken under s. 218(e) of the Companies Act 1965, by proving the establishment of a 'debt due and payable'; in that it must be due at the time of the demand; and made enforceable by threat of winding-up proceedings. But where the debt is disputed, as in this case, being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal. Until then, the debt is sub-judice, and any presentation of the petition in the circumstances is an abuse of the process of court, and the court will lend its willing hands to restrain the petitioner from presenting or proceeding of the petition under s. 222 of the said Act.

In respect of O. 92 r. 4 of the RHC and the inherent jurisdiction of the court to grant stay, His Lordship relied on the authority of the Federal Court case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 where Edgar Joseph Jr FCJ had expressed his view that the function of the RHC is to regulate the machinery of ligitation. The RHC cannot confer or take away or alter or diminish any existing jurisdiction or any existing rights or duties and that, therefore, the RHC cannot extend into the area of substantive law.

The facts and *ratio recidendi* of the second case, namely, the *Public Bank* case *(supra)*, are substantially similar to those in the *Solid Kitchen* case *(supra)* except that the summary judgment was granted by the senior assistant registrar of the High Court who had also dismissed the petitioner's application for a stay of execution pending appeal. At p. 93, Rekhraj J said as follows in respect of the summary judgment:

> It is not a final judgment, that has finally disposed off the rights of the parties. To be final, it must be said to be the last and conclusive judgment without any right; or subject of appeal. At most, such a judgment in the interim is either a contingent creditor, because his debt will only become due to him on an event upon the successful launching of the appeal, or a prospective creditor; in that the debt crystalises upon the determination of the appeal in favour of the petitioner; and until then neither of the creditors, other than the judgment creditor has a right to present a petition, without first establishing the debt.

As for the third case, namely, the *Bina Satu* case *(supra)* there is a very important distinction between the facts in that case and the facts in the instant case although in both cases there was an application for an equitable injunction to restrain the presentation of a winding-up petition. The important distinction is that, in that case, the statutory notice issued pursuant to s. 218(2)(a) of the Companies Act was not premised on a judgment debt. Further, the learned judge accepted the contention of the respondent that the claim by the petitioner was disputed by the respondent and that the petition was being "presented ostensibly for a winding-up order but in reality for another purpose such as to bring pressure to bear on the company". Consequently, the learned judge granted the injunction sought for in exercise of the court's inherent jurisdiction to prevent an abuse of the process of the court. In doing so, VC George J relied on the authority of *Cadiz Waterworks Co v. Barnett* LR 19 EQ 182 where it was held that the creditor of a solvent company whose debt is *bona fide* disputed will be restrained from presenting a petition for the winding-up of the company.

At this juncture it is pertinent to note that the expression *"bona fide"* was not used in the cases decided by Rekhraj J. The court notes that this expression is only used where the statutory notice is not anchored on a judgment debt. (See *In Re Ban Hong Co. Ltd* [1959] 25 MLJ 100, *Re Nima Travel Sdn Bhd & Sun Soon Heng Coach Works Sdn Bhd v. Nima Travel Sdn Bhd* [1986] 2 MLJ 374 and *Re Mechanised Construction Pte Ltd* [1989] 3 MLJ 9.)

In the fourth case, namely, the *Isyoda* case *(supra)*, there was again no judgment debt. Abdul Aziz J dismissed the originating summons for an injunction to restrain the defendant from presenting a winding-up petition against the plaintiff on the ground that it did not comply with O. 7 r. 3(1) of the RHC as it did not include sufficient particulars to identify the cause of action. Although the originating summons did not state why the defendant should be restrained from applying for a winding-up of the plaintiff company it was clear to His Lordship that the plaintiff's cause of action was an abuse of the process of the court. Nevertheless, His Lordship felt bound by the strict ruling in the Court of Appeal case of *Saraswathy Devi a/p Nadchatiram v. Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 CLJ 1035 that such an omission was fatal to the proceedings. Mr. G. Rajasingam, in seeking to distinguish that case on facts, submitted that in the instant case, the cause of action, namely, abuse of process of court, has been stated in the originating summons and that, therefore, the court should grant the plaintiff, the injunctive relief claimed.

In my respectful view, as the issue whether a company can move the court for an injunction on the ground of abuse of process of court to restrain the presentation of a winding-up petition based on a judgment debt did not arise in that case, the following views which the learned judge expressed at p. 626, to the effect that as long as the debt is *bona fide* disputed the status of the would-be petitioner is not established, have to be considered in that context:

> It is of course true that if the demand is not settled within the three weeks the creditor is entitled to present a winding-up petition and that is because the company is then, according to s. 218(2)(a) of the Act, deemed to be unable to pay its debt. *But fundamental to the deeming is the question whether the would-be petitioner is a creditor and so long as the debt is bona fide disputed his status as a creditor is not established. That is why, even after the petition is presented, the advertisement of it or further proceedings on it may be restrained if it is shown that the debt is bona fide disputed.* (emphasis added.)

In order to demonstrate to the court that the judgment debt is *bona fide* disputed, Mr. G. Rajasingam has submitted that there are merits in the plaintiff's appeal to the judge in chambers in the said suit. He has put forth the following five grounds. First, he says that estoppel applies because the defendant has retained a Malayan Banking Berhad (MBB) guarantee which was given subsequent to the corporate guarantee and which has not only effectively put an end to the liability of the defendant under the corporate guarantee but also limited the liability of the defendant to 90 days hire amounting to RM1,531,350 only. Secondly, the learned deputy registrar, in construing the legal effect of the corporate guarantee erred when she held that the arbitration award was binding on the plaintiff when the plaintiff was not a party to the arbitration proceedings. Thirdly, the learned deputy registrar also erred in failing to appreciate that the liability of the defendant under the corporate guarantee, in any event, was limited to 90 days hire which amounts to RM1,531,350 only. Fourthly, the learned deputy registrar erred in law when she failed to appreciate that there was no valid assignment of the Time Charter to the defendant resulting in the defendant having no *locus standi* to sue the plaintiff in the first place. Fifthly, the learned deputy registrar erred in resolving the conflicting evidence of the plaintiff and the defendant as contained in their respective affidavits without the benefit of oral evidence.

In addition, he says that unless the defendant is so restrained, the plaintiff being a highly reputable company would suffer imminent and irreparable harm to its business and reputation because it would have lost the confidence of its trading and business associates. Further, he says that the plaintiff's appeal if successful will be rendered nugatory and the plaintiff would have been deprived of the fruits of its success if the defendant is not so restrained. Lastly, he says that the defendant will not suffer prejudice in monetary terms as the judgment sum has provided for the payment of interest on the judgment sum until full settlement thereof.

Cases Cited By The Defendant

I shall next consider the authorities relied on by the defendant which hold a contrary view, namely, where the statutory notice is founded on a judgment debt the court will not grant a discretionary injunction to restrain the petitioner from presenting a winding-up petition on the ground of abuse of process of court unless the judgment has been stayed or set aside.

In the first case, namely, the *Patel* case *(supra)*, Wan Adnan Ismail J (now PCA) had set aside an *ex parte* injunction restraining the first defendant from presenting to the court or any other court a petition to, *inter alia*, wind up the plaintiff. In doing so, His Lordship rejected the plaintiff's contention that the debt claimed which was based on a judgment, although

it was a judgment in default of defence to the defendant's counter claim, was a disputed debt and that the defendant's action in serving on the plaintiff a demand under s. 218 of the Companies Act 1965 based on the judgment debt was for the sole purpose of applying pressure on the plaintiff.

He said as follows at *Patel Holdings Sdn Bhd v. Estet Pekebun Kecil Sdn Bhd & Anor* [1990] 2 CLJ 280 at p. 281; ([1990] 2 CLJ (Rep) 611) (at p. 612):

> In my view the judgment had been regularly obtained. A judgment remains regular and enforceable until it is set aside by the court. Although the plaintiffs had filed an application to set aside the judgment, the judgment remains regular and enforceable until it is set aside. Until the judgment is set aside the claim by the first defendant based on the judgment cannot be regarded as a disputed debt. It is in fact an enforceable judgment debt.

He continued as follows:

> The first defendant is merely doing what it has the right to do having obtained a judgment against the plaintiffs which judgment has not been stayed.

In the second case, namely, the *Aspatra* case *(supra)*, it was held by the Supreme Court that the learned registrar of the High Court should be considered notionally to be making the order of substituted service as if he were a deputy High Court judge and unless set aside in proceedings instituted for the very purpose, subject to a very few rare exceptions, the order of substituted service of the High Court which is a superior court of competent jurisdiction must be obeyed by everyone. Although the facts of that case are different from those in the present case and the issue whether the presentation of a winding-up petition based on a judgment debt can be restrained by an injunction did not arise at all, the decision suggests that a summary judgment granted by the learned deputy registrar of the High Court, *albeit* pending appeal, must be obeyed by everyone, unless stayed or set aside on appeal.

In the third case, namely, the *Bank Utama* case *(supra)* one of the two issues before the court was whether a judgment debt could form the basis of a winding-up petition. In that case the appellant had obtained a summary judgment against the respondent in respect of a debt. The respondent's appeal against the summary judgment had been dismissed by the learned High Court judge. The respondent appealed to the Court of Appeal. Subsequently, the appellant presented a winding-up petition against the respondent based on the judgment debt.

The respondent raised an objection on the ground that as there was a pending appeal to the Court of Appeal the judgment debt was a disputed debt. The respondent argued that, therefore, it could not form the basis of the winding-up petition. Abdul Aziz J declined to follow the decision of Rekhraj J in the *Solid Kitchen* case *(supra)* and rejected the objection. His Lordship held as follows at p. 528:

> With respect, my understanding of what is meant by a disputed debt in the context of a winding-up petition is that it is a debt in respect of which it is shown, with grounds supported by evidence, that there is a *bona fide* dispute. A debt is not a disputed debt in that context simply because the respondent maintains that he disputes the debt. A judgment on the debt establishes in law that there is no *bona fide* dispute as to the debt. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is *bona fide* disputed. The judgment has already established the contrary.

This decision is in line with the decision in the *Patel* case and also His Lordship's earlier decision in *Isyoda* although both these cases were not mentioned in his judgment. The reasons put forth by His Lordship succinctly explain the vital difference between the presentation of a winding-up petition based on a judgment debt and the presentation of a winding-up petition based on a *bona fide* disputed debt. A *fortiori*, I find Mr. G. Rajasingam's attempt to distinguish that case on the ground that in the instant case the plaintiff's appeal against the summary judgment has yet to be decided by the High Court to be a rather feeble one and without merits.

It is also my understanding that the following comments in the decision of VC George J in *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors (supra)* at p. 229 (at p. 658):

> It has become the practice in the High Court, certainly in Kuala Lumpur, that the Senior Assistant Registrars (many of whom are comparatively speaking junior officers) are burdened with long lists and that out of necessity they dispose of their summary jurisdiction in so summary a manner that most of the judges who hear appeals from those decisions do not now require the Senior Assistant Registrar to even write grounds of decision but hear the appeal by way of a re-hearing of the original application, a re-hearing in every sense of that word. This is not to derogate the judicial role played by the Senior Assistant Registrars. They act as an effective filter stopping some of the more blatantly unmeritorious applications from going through the sieve.

were made in the context of an application for a stay of execution of a summary judgment granted by a senior assistant registrar of the High Court and I do not think it was His Lordship's intention to extend his comments to the presentation of a winding-up petition based on a summary judgment which is pending appeal because different legal principles and considerations apply. In the instant case, the plaintiff should have acted promptly to obtain a stay of execution of the summary judgment.

The Decision Of The Court

In the instant case, the summary judgment granted by the learned deputy registrar is a valid and enforceable judgment unless set aside or stayed pending appeal. The learned deputy registrar had considered the affidavit evidence of both parties before deciding that the defendant had established a *prima facie* claim against the plaintiff. Upon the defendant obtaining the judgment the debt ceases to be a disputed debt. Thereafter, the question whether the debt is a *bona fide* disputed debt becomes a non-issue. This is so even though the plaintiff has filed an appeal against the judgment because the filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained.

The plaintiff here has rightly proceeded to issue a statutory notice against the defendant pursuant to s. 218(2)(a) of the Companies Act 1965. Upon the expiration of the 21 day period as set out in the statutory notice and the judgment debt remaining unpaid, the debt becomes "due and payable" and the plaintiff is deemed to be unable to pay its debts. Consequently, the defendant succeeds in acquiring the status of "creditor" for the purposes of winding-up proceedings pursuant to s. 217(1)(b) and s. 218(1)(e) of the Companies Act 1965.

Therefore, the defendant is entitled as of right to present a winding-up petition against the plaintiff. This right is a substantive right conferred upon the plaintiff by s. 217(1)(b) of the Companies Act 1965, a substantive law, and neither O. 92 r. 4(2) of the RHC, a procedural law, nor the inherent jurisdiction of the court can deprive the defendant of that right or reduce the extent of that right as the question of abuse of the process of the court ought not to arise at all in such a context.

As was said by Edgar Joseph Jr FCJ in the *R Rama Chandran* case *(supra)*, O. 92 r. 4 of the RHC and the inherent powers of the court cannot "take away or alter or diminish any existing jurisdiction or any existing rights …". In my view the presentation of a winding-up petition is an existing right under s. 218(1)(e) of the Companies Act 1965. On this point I would

like to state here that I experience some difficulty in reconciling what was said by Rekhraj J at p 440, paras F to G, in the *Solid Kitchen* case *(supra)* and the obiter dicta in that case concerning the presentation of a winding-up petition being regarded as an abuse of the process of court.

With the utmost of respect, based on the reasons set out above, I decline to follow the decisions in the *Solid Kitchen* and the *Public Bank* cases *(supra)*.

Concerning the five grounds advanced by the plaintiff touching on the merits of the appeal, I am in complete agreement with Mr. K.L. Wong, learned counsel for the plaintiff, that it would not be proper for me to consider them in these proceedings since there is already a regular and enforceable judgment.

I come now to the last issue, namely, whether there is a *bona fide* serious question to be tried so as to satisfy the first prerequisite for the granting of an *inter partes* interlocutory injunction in accordance with the established legal principles governing the grant of such relief. (*See Keet Gerald Francis John v. Mohd Noor bin Abdullah (supra)*.) As the court is of the view that the exercise by a would-be petitioner of his legal right to present a winding-up petition against a company for non-compliance of a s. 218(2)(a) Companies Act 1965 statutory notice anchored on a judgment debt, *albeit* pending appeal, cannot be regarded as an abuse of the process of the court, the court is satisfied that there is no *bona fide* serious question to be tried.

In the premises, the court dismissed encl. 7 and set aside the *ex parte* injunction with costs in the cause.